reporting that was deemed lacking in candor was related in subject matter to the affirmative action regulations. *Id.* at 349-50. Not only could the broadcaster assert its own rights to challenge the regulations, it could assert the rights of third parties -- its employees -- to whom the regulations had never been directly applied. *See id.* The D.C. Circuit found that the "black mark" on its record resulting from the forfeiture itself was sufficient injury to give the broadcaster standing to challenge the regulations whose existence indirectly led to the forfeiture. *Id. But see United States v. Dunifer*, 997 F.Supp. 1385, 1389 (N.D. Cal. 1998) (station which has not applied for a license can only challenge the FCC's regulations on overbreadth grounds, not as applied to him, because merely being injured by the regulations is not enough).

The fact that the constitutionality of the Commission's licensing scheme has been previously upheld by the courts, *e.g., National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), does not mean that the FCC's regulations adopted under color of those statutes (here the ban on microbroadcasting) are constitutional, and thus Szoka's failure to obtain a license as required by statute does not prevent him from challenging the Class D regulations which make it impossible for him to obtain a license. The courts have repeatedly struck down regulations adopted by the Commission pursuant to its rule-making authority where those restrictions contravened constitutional guarantees. *See, e.g., Lutheran Church v. F.C.C.*, 141 F.3d 344 (D.C. Cir. 1998) (voiding the Commission's affirmative action policy for licensees, 47 C.F.R. § 73.2080(b)&(c), as in violation of the Fifth Amendment's ban on race discrimination, even though the rule was adopted pursuant to the Commission's authority under 47 U.S.C. § 303, previously upheld by the courts, *e.g., National Broadcasting Co. v.*

United States, 319 U.S. 190 (1943)(upholding the "public interest" standard of 47 U.S.C. § 303); *King's Garden, Inc. v. F.C.C.*, 498 F.2d 51 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 996 (1974)(upholding FCC's power to regulate hiring practices of broadcasters pursuant to 47 U.S.C. § 303's public interest standard), to regulate the hiring practices of licensees). Given that Congress is owed "a standard [of constitutional review] more deferential than we accord to judgments of an administrative agency," *Turner Broadcasting v. F.C.C.*, 117 S.Ct. 1174, 1189 (1997), it would be anomolous to simply rubberstamp agency regulations simply because they purport to implement the will of Congress.

Contrary to the suggestion in *In re Ptak*, CIB Docket No. 98-44 (July 6, 1998) (following the decision in *United States v. Dunifer*, 997 F.Supp. 1235 (N.D. Cal. 1998)), it is well-established that although a statute governing an agency may be constitutional, the agency's interpretation of that statute may be unconstitutional, and may violate the very statute it purports to implement. *E.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 574-75 (1988) (rejecting the National Labor Relations Board's interpretation of National Labor Relations Act provisions which were previously upheld by the Supreme Court, because the NLRB's interpretation of them might violate the First Amendment); *Miller v. Johnson*, 515 U.S. 900, 927 (1995) (rejecting the Justice Department's interpretation of the Voting Rights Act, which it administers, because "the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Voting Rights Act, once upheld as a proper exercise of Congress authority under § 2 of the Fifteenth Amendment [in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)] into tension with the Fourteenth

Amendment"); *Hopwood v. State of Texas*, 78 F.3d 932, 954 n. 47 (5th Cir. 1996), *cert. denied*, 116 S.Ct. 2581 (1996)(rejecting the interpretation of Title VI of the Civil Rights Act adhered to by the agency which issues regulations under it, the Office for Civil Rights ("OCR"), as violating the Constitution and Title VI itself; "To the extent that OCR has required actions that conflict with the Constitution, the directives cannot stand."), *citing Miller v. Johnson*, 515 U.S. 900, 921 (1995)("compliance with federal antidiscrimination laws [those upheld in *Katzenbach*, *supra*] cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws"). Thus, Szoka's ability to challenge the Class D regulations is not foreclosed by prior rulings upholding the Commission's general power to license broadcasters.

As the target of an enforcement proceeding seeking both an injunction and a forfeiture, Szoka does not need to show standing to raise a First Amendment defense -- since the requirement of standing does not apply to defendants, *Wynn v. Carey*, 599 F.2d 193, 196 (7th Cir. 1979), provided the plaintiff has already brought an action which it had standing to bring. In any event, Szoka clearly has standing, since he satisfies the three-part test most recently articulated in *Lujan*: (1) the injunction sought by the CIB is a "concrete and particularized" and "actual or imminent" threat to his First Amendment interest in continuing to broadcast; (2) the proceeding against Szoka, and the injunction sought against him, are "fairly traceable" to the Class D Regulations Szoka seeks to challenge, which prevent him from obtaining a license; and (3) the harm Szoka seeks to avoid "will be redressed by a favorable decision" rejecting the CIB's request based on the invalidity of the Class D regulations. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Even if the very real injury of being sued for an injunction against his speech were not enough injury to establish standing to challenge the regulations as applied to him -- as the *Dunifer* decision contends -- Szoka would still have standing, since a license application would have been futile, and even outside the First Amendment context, a plaintiff need not submit to the policy being challenged as applied to him if it is clear that application would have been futile. *See Lodge 1858, American Federation of Government Employees v. Paine*, 436 F.2d 882, 896 (D.C. Cir. 1970)("the exhaustion requirement does not obtain when it is plain that any effort to meet it would come to no more than an exercise in futility"); *Atlantic Richfield Co. v. U.S. Dep't of Energy*, 769 F.2d 771, 782 (D.C. Cir. 1984)("exhaustion is not required where it is 'highly unlikely' that the [agency] would change its position if the case were remanded to it"); *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997); *Tribune Co. v. FCC*, 133 F.3d 61, 67 (D.C. Cir. 1998). The well-established rule of law is that resort to further administrative remedies is not required where the issues have been fairly presented to the agency, where administrative remedies available are inadequate, or where further appeal for agency action would be futile. *Greene v. United States*, 376 U.S. 149 (1964); *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Sanders v. McCrady*, 537 F.2d 1199, 1201 (4th Cir. 1976); *Hodges v. Callaway*, 499 F.2d 417 (5th Cir. 1974). "Courts should be flexible in determining whether exhaustion should be excused." *Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir. 1997).

Any application for waiver would clearly have been futile. The decisional authority makes clear that the "futility" exception is properly applied where resort to the agency would be useless because the agency has articulated a clear position on the issue which demonstrates

that it would be unwilling to reconsider. *Clouser v. Espy*, 42 F.3d 1522, 1532 (9th Cir. 1990); *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 1441 (9th Cir. 1990); *El Rescate Legal Service v. Executive Office of Immigration Review*, 959 F.2d 742, 747 (9th Cir. 1991). The FCC demonstrated beyond all doubt that it would be unwilling to license microbroadcasters in Memorandum Opinion and Order In the Matter of Application for Review of Stephen Paul Dunifer. 11 F.C.C. Rcd 718 (Aug. 1, 1995) at ¶ 10 ("Mr. Dunifer's argument that the Commission's rules limiting licenses for low power FM services violate the First Amendment is unavailing").

In fact, it would have been futile for Szoka to seek a license for GR from the Commission. The FCC has never granted a waiver of the Class D regulations, except to two isolated instances that involved waivers for original programming for retransmitting facilities owned by Native Americans which were in such isolated areas that they received no other programming. *Turro v. FCC*, 859 F.2d 1498, 1500 n.1 (D.C. Cir. 1988). In *Turro*, moreover, the Court upheld the FCC's decision not to grant waivers of the its rule banning original programming on low-power translators. The Court accepted the Commission's rationale for the blanket ban, administrative convenience, on the basis of the "floodgate" argument. *Id.* at 1499. The Commission would interpose this "floodgate" justification for rejecting waivers to microbroadcasters such as Szoka. The Commission itself eliminated any doubt that it has an open mind on waiver requests (sufficient to mandate "useless" exhaustion as a necessary element of standing to raise affirmative defenses to this enforcement action) in its August 2, 1995 Memorandum and Order denying Dunifer's Application for Review of his Notice of Apparent Liability, 11 F.C.C. Rcd 718 (1995).

Szoka's inquiries about the possibility of waiver have fallen on deaf ears. Szoka May 27, 1998 Tr. at 17 (FCC said it does not issue licenses for Class D stations); FCC, "Low Power Broadcast Radio Stations," <http://www.fcc.gov/mmb/asd/lowpwr.html (July 18, 1998) ("No new Class D FM stations will be authorized outside the state of Alaska").

Other applicants seeking waivers have been repeatedly rebuffed. *See id.* (over 13,000 applications have been denied); Dunifer Dcl. [Ex. A] at ¶ 6 ("As a result of the litigation in this case, I have been contacted by hundreds of individuals who have attempted to obtain permission to broadcast without having to comply with the 100 watt requirement established by the FCC. To my knowledge, there has not been one example of the FCC's approving such broadcasts, regardless of the fact that some stations exist in rural areas where there are virtually no other stations around and no conceivable concern about 'spectrum scarcity"), ¶ 5 ("I am attaching several articles and letters regarding the failed attempts by such individuals to obtain permission to broadcast from the FCC. There are literally dozens of individuals and groups who have indicated to me that they are prepared to testify at trial in this case and describe to the court the ways in which the FCC has refused to accommodate their desires to broadcast legally"). Refusing to allow Szoka to challenge the regulations as applied to him on the grounds that he did not apply for a license would be senseless, since any tribunal would still have to address his overbreadth challenge, and it is a basic principle of judicial restrain to decide as-applied challenges first in order to avoid having to reach the issue of overbreadth. *Colorado Republican Campaign Committee v. F.E.C.*, 116 S.Ct. 2309, 2320 (1996)(facial challenge should generally not be decided before as-applied challenge is decided).

Szoka should not be put to the futile task of applying for licenses and waivers–and being rejected by the Commission–solely as a predicate to his defensive challenge to the rule-imposed limitations on microbroadcasting as unconstitutional. The Commission has done nothing to evidence an open mind on this issue (at least subject to the outcome of the notice of inquiry) and has given every indication that nothing Szoka could have done or can do would get him a license to operate GR. *Cf. U.S. Telephone Ass'n v. F.C.C.*, 28 F.3d 1232, 1235-36 (D.C. Cir. 1994) (in striking down forfeiture "guidelines" as an unlawful rule promulgated without prior notice and comment, court found that FCC's characterization of guideline as a "policy statement" exempt from rulemaking procedures was an improper effort to evade review of its substance since FCC mechanistically applied the "guideline" in all but 8 of 300 cases).

B. The Class D Regulations are an Unconstitutional Prior Restraint Because They Impose a Blanket Ban on Szoka's Speech.

The Class D regulations are an unconstitutional prior restraint, and are unconstitutionally overbroad as well. "[A]ny permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant government interest, and must leave open ample alternatives for communication." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). A rule "requiring a permit and a fee before authorizing" First Amendment activity "is a prior restraint on speech." *Id.* at 131, citing *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969). "Prior restraints on speech are the most serious and the least tolerable of infringement on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), and

thus "there is a 'heavy presumption' against the validity of a prior restraint." *Forsyth County v. Nationalist Movement*, 505 U.S. at 131, *citing Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Statutes regulating the time, place, and manner of communications are facially overbroad when they delegate standardless discretionary power to administrators resulting in unreviewable prior restraints on First Amendment rights. *E.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990); Forsyth County, 505 U.S. at 131, *citing Freedman v. Maryland*, 380 U.S. 51 (1965). These principles apply with added force to Szoka's radio station, since "music and other forms of cultural expression are traditionally protected under the First Amendment." *Citizens Committee to Save WEFM v. F.C.C.*, 506 F.2d 246, 251 (D.C. Cir. 1974).

Szoka did not need to apply for a license to challenge the Class D Regulations as overbroad. The seminal case in this area is *Thornhill v. Alabama*, 310 U.S. 88 (1940). In that case, Thornhill was convicted of violating a statute prohibiting a person without just cause or legal excuse to picket business premises. Thornhill defended himself on the ground that the statute was unconstitutional on its face. 310 U.S. at 91. The Court explained that Thornhill need not have applied for a license to challenge the statute because "the character of the evil inherent in the licensing system . . . is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of expression." *Id.* See *also Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969)(since "a person faced with . . . an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license," ordinance giving city commission power to prohibit processions

and demonstrations was unconstitutional); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56 (1988)(successful facial attack on city ordinance that gave the mayor "unfettered discretion to deny annual newsrack applications and unbounded authority to condition the permit on any additional terms he deems 'necessary and reasonable.'"); *cf.* Reed Hundt, May 28, 1996 speech at University of Pittsburgh School of Law, *available in* <http://www.fcc.gov/Speeches/Hundt/spreh528txt ("FCC's own history certainly demonstrates that vague rules create real possibilities for mischief").

Here, the licensing and hypothetical waiver scheme resulting from the Class D regulations not only makes an application futile -- as is explained above -- but also contains three additional infirmities: it is overly broad, leaving gaps and therefore waste in the electromagnetic spectrum, it is essentially standardless, making it an unconstitutional prior restraint, and it fails to leave open ample alternative channels for communication.

First, the FCC's complete ban on microbroadcasting is overbroad. Restrictions on broadcasting should be "narrowly-tailored to further a substantial governmental interest." *F.C.C. v. League of Women Voters*, 468 U.S. 364, 380 (1984); *In re Syracuse Peace Council*, 2 F.C.C. Rcd 5043. ¶ 77 (1987) ("scarcity" is improper basis for applying diluted standard of constitutional protection to electronic media; "governmental restrictions on broadcasters' speech are permissible under the First Amendment only in situations in which those restrictions are 'narrowly tailored to further a substantial government interest'"), *citing League of Women Voters, supra*. "[A]ny permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant government interest, and must leave open ample alternatives for communication."

Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992). "'A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy.'" *Fane v. Edenfield*, 945 F.2d 1514, 1518 (11th Cir. 1991)(*quoting Frisby v. Schultz*, 487 U.S. 474, 485 (1981)), *aff'd, Edenfield v. Fane*, 507 U.S. 761 (1993).

Moreover, "when the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured'. . .It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and materials way." *Turner Broadcasting System v. F.C.C.*, 512 U.S. 622, 664 (1994), *citing Edenfield, supra.* This is especially true when a restriction effectively regulates the content of speech. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (such restrictions must (1) serve a compelling state interest and (2) employ the least restrictive means); *see In re Syracuse Peace Council*, 2 F.C.C. Rcd 5043, ¶ 82 (1987) ("We believe that the function of the electronic press in a free society is identical to that of the printed press and that, therefore, the constitutional analysis of government control of content should be no different"). Directing and managing the content of radio programs is at the heart of the FCC's decision to suspend future licensing of Class D radio stations. As mentioned above, this has the certain effect of disallowing less popular, more radical opinions or distinctive formats to reach a radio audience. Dunifer Dcl. [Ex. A] at ¶ 8; *cf. Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1973) ("The preservations of a radio format that would otherwise disappear, though economically and technologically viable and preferred by a specific number of listeners, is generally in the public interest.").

In spite of the flexibility which it is allowed, indeed, required to exercise by the Act and the Constitution, the FCC bars microbroadcasting even in many cases where -- as in Mr. Szoka's case -- licensing the microbroadcaster would not lead to interference. Szoka Dcl. at ¶ 21 & Ex. A. Szoka's own station is a case in point. An April, 1998 study by telecommunications engineer Doug Vernier showed negligible interference by Szoka's station with any other stations, even though there is no space for an additional full-power FM radio station in Cleveland. Similarly, Free Radio Berkeley, which operated in the San Francisco Bay Area, fit a niche in the electromagnetic spectrum. Dunifer Dcl. [Ex. A] at ¶ 15 ("The frequency used by Free Radio Berkeley is also assigned to a 50,000 watt station in Modesto. Due to the distance, a Oakland/Berkeley area does not fall within the primary service area of this station. A full power station could not be put on this frequency in San Francisco, due to possible interference with Modesto, however. A micropower station fits into this pocket efficiently with no possibility of interfering with the primary service area of Modesto due to the low power and antenna."), ¶ 19(d)("in the Bay Area, no additional full power stations can be added, yet there are still approximately ten slots in between the existing stations that are suitable for microbroadcasters that would not cause interference with the licensed stations."). These cases are far from unique. Dunifer Decl. [Ex. A] at ¶6 ("some stations exist in rural areas where there are virtually no other stations around and no conceivable concern about 'spectrum scarcity'"), ¶ 14 ("Because the FCC allows such high power levels, 30-50 times the signal strength needed by an average FM receiver in the primary service area, the FM spectrum in the major urban areas has no room left for additional full power stations, in spite of the fact that there are numerous unused channels. This creates pockets which can be filled

by micropower FM stations."); ¶ 17 ("It is now possible for individuals to operate low power stations with equipment that meets or exceeds FCC standards for stability and signal purity, and for these stations to operate within gaps in the spectrum that are required to separate full power stations, resulting in an overall more efficient spectrum").

Current regulations do not meet the requirements of narrow tailoring. "Since the principle that a multitude of voices will produce a multitude of ideas is at bottom premised on free entry into the media of communication, that principle must be re-examined to insure that the process of limitation of entry does not itself deny the First Amendment rights of those who might otherwise speak through the scarce media." *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 274 (D.C. Cir. 1974)(Bazelon, C.J., concurring). While it may be more convenient for the FCC to have a blanket policy on Class D stations, the possibility of significantly greater tailoring creates a statutory duty to tailor regulations to afford greater opportunities for speakers such as Szoka to use the FM band. *Sable Communications of California, Inc. v. FCC*, 492 US at 130 (law must have more than conclusory assertions of effects; evidence must show "*how* effective or ineffective the FCC's most recent regulations were or might prove to be") (emphasis in original).

Canada's experience with microbroadcasting provides an example of a more narrowly tailored regime that serves the goal of allowing a "multitude of voices." *Id.* Since 1978, Canada has licensed low power FM radio broadcasters in remote communities with a simple three-page application form. Broadcast Procedure BP-15 [Ex. B], Canada Department of Communications, p.1 (1978); *see United States v. Dunifer*, No. C 94-03542-CW (Jan. 30, 1995); http://www.surf.com/-graham/microradio.appforreview.html. The Canadian Radio-

Television and Telecommunications Commission (CRTC) has modified its rules in 1993 to permit such broadcasts even in urban areas, where frequency space is much more scarce. Public Notice CRTC 1993-95 [Ex. C], CRTC (1993); *Dunifer, supra* ("in 1993 Canada modified its rules to permit microbroadcasting in urban areas"). Indeed, in a report on low power television, the F.C.C. itself attached as an appendix a copy of Canadian recommendations regarding the regulation of low power FM broadcasting. These recommendations included the suggestion that application forms and required information be simple enough to allow for easy application by potential low power licensees. Report and Recommendations in the Low Power Television Inquiry, Appendix 1 (BC Docket No. 78-253). Review of the F.C.C. Report and the attachments thereto reveals that the licensing and administrative requirements necessary to oversee operation of micro radio stations is not overly burdensome. Indeed, these licensing forms reveal that microradio can be easily regulated so as to prevent any risk of signal interference. Their existence creates enough proof that the "least restrictive means" are not being employed by the FCC in its regulation of smaller radio stations and that the burden is now on the FCC to justify its regulations.

Buttressing the Canadian experience is the increasing interest in microradio in other nations across the globe. Microradio stations are being utilized in Colombia, where the government plans to license 1000 such stations, Dunifer Dcl. [Ex. A] at ¶ 9, and in the Philippines, where UNESCO, the development arm of the United Nations, is planning to set up micro radio stations. *Id.* at ¶ 10. An international radio conference has endorsed the use of microradio stations. *Id.*

Moreover, the F.C.C.'s study of micro broadcasting, on which the FCC has relied in refusing to license microradio stations, was conducted in 1978, making it obsolete in light of changes in technology since then that increase precision and reduce interference in broadcasting. The technology has changed since then, and the feasibility of micro-power broadcasting has changed with it. *Accord United States v. Dunifer*, No. C 94-03542 CW, Memorandum and Order Denying Plaintiff's Motion for Preliminary Injunction and Staying this Action (N.D. Cal., Jan. 30, 1995) (in light of changes in technology, "the government has failed to establish a probability of success on its contention that the current regulatory ban on micro broadcasting is constitutional"); Dunifer Dcl. [Ex. A] at ¶ 17-19 (micro radio poses little danger of interference), ¶ 17-18 (technological changes have made micro radio feasible by making non-interfering operation possible in niches between major broadcasters).

The F.C.C. has an obligation to revisit the viability of microradio in light of rapid technological changes since 1978. "The Commission, in its task of managing an ever-changing technological and economic marketplace, has the responsibility to consider new developments in reviewing existing, and in applying new rationales in that marketplace. . .It is appropriate for an administrative agency to modify or eliminate its policies if the conditions addressed by the regulation have changed. . . .As the Supreme Court has stated, 'the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully." *In re Syracuse Peace Council*, 2 F.C.C. Rcd. 5043, ¶ 64 & n. 172 (1985)(emphasis added), *quoting F.C.C. v. WNCN Listeners' Guild*, 450 U.S. 582, 603 (1981). The courts have repeatedly overturned, or compelled the F.C.C. to reconsider, policies which have outlived their usefulness. *E.g., Schurz*

Communications v. F.C.C., 982 F.2d 1043 (7th Cir. 1993)(invalidating FCC order except insofar as it repealed "the 1970 finsyn rules," *id.* at 1053-54, in light of internal FCC report indicating that "the rules had outlived their usefulness"); *Meredith Corp. v. F.C.C.*, 809 F.2d 863, 873-74 (D.C. Cir. 1987) (ordering F.C.C. to reconsider the Fairness Doctrine in light of an F.C.C. report expressing doubt about some of the premises of the Fairness Doctrine); *see also Bechtel v. F.C.C.*, 10 F.3d 875, 880 (D.C. Cir. 1993)(overturning policy favoring integration of ownership, which was originally upheld by the courts in deference to the FCC's predictive judgments, where those predictions failed to materialize); *F.C.C. v. League of Women Voters*, 468 U.S. 364, 377 n.11 (1984)(conceding it may be "that technological developments have advanced so far that some revision of the system of broadcast regulation may be required"); *In re Syracuse Peace Council*, 2 F.C.C. Rcd 5043, ¶ 60 ("because technological developments have rendered the [Fairness] doctrine unnecessary to ensure the public's access to viewpoint diversity, it is no longer narrowly tailored to meet a substantial government interest and therefore violates the standard set forth in *League of Women Voters*"); *cf. Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 399 (1969) (recognizing that "[t]he rapidity with which technological advances succeed one another . . . makes it unwise [for the Court] to speculate on the future allocation of [the electromagnetic spectrum]"). It was entirely foreseeable that rapid technological change would eventually make the ban on micro broadcasting obsolete, in light of advances in radio signal purity and stability that produce continual enhancements in potential spectrum efficiency. *See In re Syracuse Peace Council*, 2 F.C.C. Rcd. 5043, ¶ 64 & n. 172 (1985) (noting "continuing technological advances in spectrum efficiency"), *citing* 1985 Fairness Report, 102 F.C.C.2d

142, 203 (1985); *In re Syracuse Peace Council*, 2 F.C.C. Rcd 5043, ¶ 77 ("[A]dvances in technology could make it possible to utilize the spectrum more efficiently in order to permit a greater number of licensees. So the number of outlets in a market is potentially expandable, like the quantities of most other resources."); Commissioner Michael Powell, April 27, 1998 Speech Before Freedom Forum <http://www.fcc.gov/Speeches/Powell/spmkp809.html ("Broadcast channels are continually increasing. . .We must admit to these new realities and quit subverting the Constitution in order for the government to impose its speech preferences on the public.").

Further evidence of the less restrictive means available to the Commission in this regard is available in the F.C.C.'s own history. Until relatively recently, Non-Commercial Education FM broadcast stations could be licensed by the F.C.C. to broadcast with up to 10 watts of power.

Finally, the F.C.C.'s own regulations pertaining to FM translators provide an example of how the F.E.C. could regulate micro radio. The F.C.C. permits translators to re-broadcast, on frequencies within the normal commercial and noncommercial FM radio band, signals that originate from huge radio stations located far from the community in which the translator is based. See Radio World, August 10, 1994, p. 9, "Radio Translators Fill in Coverage Gaps." Current F.C.C. regulations, 47 C.F.R. § 74.1201 *et seq.*, permit low power transmitters to operate with less than 100 watts if they are transmitting a signal originating from a full-power radio station, but prohibit local broadcasters from using a transmitter with identical wattage to broadcast any program originating in the listener's community. The F.C.C. has promulgated translator regulations to address issues such as frequency assignment, 47 C.F.R. § 74.1202,

interference, 47 C.F.R. § 74.1203, licensing requirements, 47 C.F.R. § 74.1232, power limitations, 47 C.F.R. § 1235, frequency monitors and measurements, 47 C.F.R. § 12.1237, and time of operation. 47 C.F.R. § 74.1250. Many of these regulations could just as easily be applied, almost verbatim, to micro broadcasts originating in the communities to which they are being broadcast.

The absolute ban on microradio is a creation of the Commission that can be easily eliminated without detrimentally impacting the government's interest in regulating the airwaves. Even in the most densely populated urban areas, there exists available spectrum space for a multitude of micro power stations in the gaps necessary to separate full power stations from one another. A regulatory framework could easily be implemented whereby any and all currently existing and future full power stations retain top priority, and microbroadcasters are relegated to whatever spectrum space remains available. By eliminating microradio stations that can easily fit within the existing gaps among radio stations, while allowing the licensing of large radio stations that will fill up much of what remains the electromagnetic spectrum, the 1978 Second Report and Order has proven to be such an inconsistent and ineffectual means of preventing spectrum scarcity that it cannot be said to advance important state interests, as is required to provide a constitutional justification for the restrictions it places on free speech. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited,'" *quoting The Florida Star v. B.J.F.*, 491 U.S. 524, 541-542 (1989) (Scalia, J., concurring) (law banning news media, but

no one else, from disclosing names of rape victims, is so underinclusive that it shows that the goal behind the law was not a compelling interest)); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) ("[E]xemptions and inconsistencies" in alcohol labeling ban "bring into question the purpose of the. . .ban," such that it cannot be said to effectively promote substantial state interest it purports to serve). It is as if a "Federal Newspaper Commission" said that, if order to conserve paper and ink, only newspapers with at least 1 million general circulation would be legal. All church newsletters, PTA bulletins, and community weeklies would be banned. Such a ban, akin to this one, violates the First Amendment and must be rescinded.

Moreover, the F.C.C.'s licensing requirements, even if they authorized microbroadcast licenses though the waiver process, would be unduly burdensome for microbroadcasters and would thus constitute prior restraints, rather than reasonable time, place, manner restrictions on speech, because they would require microbroadcasters, who use so little power that they pose little threat to the other licensees and services, to undergo the same rigors as larger broadcasters who use much more power and hog much more of the public's airwaves. Licensing requirements cannot impose burdens out of proportion to the scale of the activity the licensee seeks to engage in and the risks. *See Murdock v. Pennsylvania*, 319 U.S. 105, 113-14 (1943) (overturning as unconstitutional a city ordinance requiring all persons canvassing or soliciting within a city to procure a license by paying a flat fee of $1.50 per day; "the license tax is fixed in amount and unrelated to the scope of activities of petitioners. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned.") (emphasis added); *Follett v. McCormick*,

321 U.S. 573, 576 (1944) (overturning as unconstitutional an ordinance which required booksellers to pay a flat fee to procure a license to sell books); *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 386 (1990)(*Murdock* and *Follett* involved "flat license taxes that operated as a prior restraint on the exercise of religious liberty"); *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050 (2d Cir. 1983) (voiding fee and liability insurance requirements for public gathering where there was no evidence to support their magnitude); *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1522 (11th Cir. 1983) (overturning licensing fee, in light of black letter law "authorizing a municipality to charge fees for the use of a public street only when such fees are both nominal and related to the expenses incidental to the policing of the event"); *cf. Cox v. State of New Hampshire*, 312 U.S. 569, 577 (1941) (upholding a sliding scale licensing fee charged for parade permits because the fee was "not a revenue tax, but one to meet the expense incident to the administration of the [licensing] statute and to the maintenance of public policy in the matter licensed"); *Center for Auto Safety v. Athey*, 37 F.3d 139, 144 (4th Cir. 1994) (upholding a statute that required charities seeking to solicit in Maryland to pay an annual sliding scale fee based on the charity's nationwide level of public contributions, and to undergo more substantial audits in correlation to their size, because "the statute's sliding scale [was] narrowly tailored to match the costs incurred by maryland in implementing the statutes")[5].

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5 Also relevant is *Minneapolis Star & Tribune Co v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 593 (1983) (tax on ink and newsprint unconstitutional; "A tax that singles out the press or that targets individual publications within the press, places a heavy burden on the State to justify its action")

II.

Not only must licensing fees be proportionate to the scale of the speaker's activity and its risks, but so too must other conditions that the speaker must satisfy to obtain a license, such as liability insurance coverage. *See Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050, 1057 (2d Cir. 1983) (voiding liability insurance requirements for public gathering where there was no evidence to support the magnitude of coverage demanded, in light of the plaintiff's small size and lack of prior history of destruction of government property; "[e]ven were the liability insurance requirement valid, no basis has been offered for the amount of coverage required."); *Holy Spirit Association for the Unification of World Christianity*, 582 F. Supp. 592, 599 (N.D. Tex. 1984) (requirement that solicitors be covered by fidelity bond was unconstitutional); *see Collin v. Smith*, 447 F. Supp. 676, 684-86 (N.D. Ill. 1978) (requirement that plaintiffs obtain a $100,000 liability policy and a $50,000 property damage policy was struck down as un unreasonable restraint on First Amendment rights), *aff'd*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978); *cf. Center for Auto Safety v. Athey*, 37 F.3d 139, 144 (4th Cir. 1994) (analyzing under First Amendment standards, and then upholding, a statute that required charities seeking to solicit in Maryland to undergo more substantial audits in correlation to the size of their solicitations).

Moreover, the FCC bears the burden of showing that its licensing system is no more burdensome on microbroadcasters than is essential, if it wishes to have its licensing system upheld as applied to them; Szoka does not bear the burden of proof. "'Since the State bears the burden of justifying its restrictions . . . it must affirmatively establish the reasonable fit we require.'" *South-Suburban Housing Center v. City of Blue Island*, 935 F.2d 868, 898 (7th Cir.

1990), *quoting Board of Trustees of State of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). Where the state produces no evidence as to its costs of administering its licensing system and policing the costs associated with the applicant's expressive activity, its licensing scheme must therefore be struck down as overbroad. *South-Suburban Housing Center v. City of Blue Island*, 935 F.2d 868, 898 (7th Cir. 1990). Here, the FCC has provided no justification for forcing Szoka to undergo a mountain of red tape simply to apply for a license for a micro radio station that is too small to pose the same magnitude of risks that a full power station could pose.

The disparity in burdensomeness between the FCC's licensing scheme and Canada's is particularly telling. "Canada's licensing scheme entails filling out a one page form and paying a small fee, while the F.C.C.'s current application requires expert legal assistance to complete, and entails" spending thousands of dollars in lawyers' fees and other expenses. Dunifer Dcl. [Ex. A] at ¶ 19(f); *accord* Dunifer Dcl.[Ex. A] at ¶ 5 ("In order to comply with the current licensing procedures established by the F.C.C., it would be impossible for a person without thousands of dollars in financial backing to receive a radio license"); Declaration of Robert W. McChesney [Ex. D], ¶ (d)("by failing to accommodate the creation and use of new microradio technologies that are simple and inexpensive to operate, the FCC has failed to meet its obligation a licensing scheme that meets the public interest"), (c)(FCC framework is "expensive and burdensome"); Julie Lew, "Radio Renegade Fights FCC Rules," *New York Times*, Dec. 8, 1997 ("'If you get an FCC license, you have to initially invest $50,000 to $100,000'")(quoting Ron Sakolsky, Professor of Public Policy at the University of Illinois); Sarah Ferguson, "Rebel Radio," *Village Voice*, May 19, 1998, p. 63 ("According to Perry, the

FCC's licensing process is so complex, it effectively shuts small broadcasters out. 'When you add up the cost for the engineering surveys and fancy Beltway lawyers required to navigate all the paperwork, it costs a minimum of $100,000 just to apply for a license'")(quoting attorney Robert Perry); *Church of Scientology Flag Service Org. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993) (materials, including newspaper articles which may not have been admissible at trial, were appropriately submitted by the non-moving party in opposition to motion for summary judgment).

The excessiveness of licensing costs are apparent when they are compared to the start-up costs for creating a non-interfering, clean-signal microradio station. Dunifer Dcl. [Ex. A] at ¶ 16 ("Every small town could have its own community voice for $1000 or less as opposed to the huge sums required under current FCC regulations"), ¶ 18(a) ("Micro broadcasting is cheap enough for an individual of less than substantial means to go on the air from their garage or home"), ¶ 18(c)("even in the last few years that have elapsed since the last translator hearings, micro radio technology has advanced a great deal in terms of affordability and signal purity and stability. At the present time a 5-10 watt micropower transmitter meeting all basic FCC requirements could be produced in volume and sold for about $200.00 or less"), ¶ 19(e)("Since the cost of putting a micropower broadcast station on the air can be $1000 or less and maintained with an entirely volunteer staff"); Ferguson, "Rebel Radio," *Village Voice*, May 19, 1998, p. 63 ("Cheap tech is a key factor fuelling the spread of micropower. Radio hacks used to convert surplus military transmitters to get a decent signal. Now you can order a complete transmitter package over the Internet for as little as $600."); *id.* ("'There's enough access to good, cheap filters and reliable equipment that with better

education and self regulation, microbroadcasters won't cause those kinds of problems'")(quoting Stephen Dunifer); Julie Lew, "Radio Renegade Fights FCC Rules," *New York Times*, Dec. 8, 1997 ("'This is the moment for this kind of thing to come together because the technology has made it possible,' said Ron Sakolsky, a public policy professor at the University of Illinois. 'If you get an FCC license, you initially have to invest $50,000 to $100,000,' he said. 'Now, its possible to do it for a much smaller cost, and people are saying, Why can't we go on the air?'"); *cf.* Margot Hornblower, "Radio Free America," *Time*, April 20, 1998 ("'There's no difference between microradio and the printing presses of the Founding Fathers that were outlawed by the British government'") (quoting micro radio announcer).

Nor, contrary to the position taken by the court in *United States v. Dunifer*, 997 F.Supp. 1235, 1239 (N.D. Cal. 1998), could the possibility of obtaining a waiver remedy the overbreadth of the FCC's restrictions -- even if obtaining a waiver were possible. Although there are apparently no written rules or regulations in existence regarding waiver of the Class D regulations, *see United States v. Dunifer*, 997 F. Supp. 1235, 1242 (N.D. Cal. 1998) (DOJ refused to respond to micro broadcaster's request for such standards, and merely referred the court to the *WAIT Radio* decision), the FCC suggested in another court, *see Dunifer*, *supra*, that under *WAIT Radio, Inc. v. F.C.C.*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) that "the FCC must give serious consideration to meritorious applications for waiver, including non-frivolous First Amendment claims when supported by adequate factual material," *United States v. Dunifer*, 997 F. Supp. 1235, 1242 (N.D. Cal. 1998), citing *WAIT Radio*, 418 F.2d at 1156-57,

and must "articulate with clarity and precision its findings and the reasons for its decisions." *WAIT Radio*, 418 F.2d at 1156.

If the F.C.C. had crafted guidelines to implement this command of the D.C. Circuit, its Class D regulations, so limited, could have comported with the First Amendment. But it did not. And the mere obligation imposed on it by *WAIT Radio* to comply with the First Amendment -- an obligation F.C.C. personnel had even prior to the *WAIT* decision, pursuant to their oath upon taking office to defend the Constitution -- cannot solve this problem. First, the fact that an administrative agency might carve out an exception to its own unconstitutional regulatory scheme if a waiver were sought cannot be used as the basis for requiring the plaintiff to exhaust his administrative remedies, since where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right. *See Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Securities and Exchange Commission v. Wall Street Transcript Corp.*, 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970).

Second, ad hoc exemptions for "protected speech" are insufficient to save an otherwise oppressive speech restrictions from invalidation, since that reflects an abdication of the legislature's (or agency's) duty to precisely define, in advance, what speech is prohibited or permitted. *See* Geoffrey Stone, et al., Constitutional Law 1128, 1130 (2d ed. 1991) (law is unconstitutionally vague where it provides that "[n]o person may engage in any speech that the state may constitutionally restrict," *id.* at 1128, since "the precise definition of constitutionally protected expression is unclear," *id.* at 1128, and through a First Amendment

exemption, "the very vagueness of the constitutionally doctrine is in effect integrated into the law," id. at 1130). Thus, the duty on licensing personnel imposed by *WAIT Radio* of providing posthoc justifications for their decisions save the regulations from overbreadth.

A prior restraint on speech is unconstitutionally vague and overbroad even when it contains an exemption or waiver from its prohibitions for speech that is constitutionally protected, since what speech is protected by the First Amendment is not self-evident to applicants, and accordingly must be spelled out *in advance* with clarity to avoid chilling their speech and to avoid the possibility of discriminatory enforcement by agency officials. *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975); *see also Dambrot v. Central Michigan University*, 839 F. Supp. 477 (E.D. Mich. 1993), *aff'd*, 55 F.3d 1177 (6th Cir. 1995); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). In *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975), the Baltimore School Board granted students permits to distribute non-school literature -- as long as the literature did not contain expression which the Supreme Court said was not protected in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) -- expression which "substantially disrupts or materially interferes with" the school. *Nitzberg*, 525 F.2d at 383. The School Board did not define what was "substantially disruptive," however, nor did it set forth any interpretive guidelines to help students know what was protected speech versus what was disruptive speech. *Id.* The Fourth Circuit, speaking through Supreme Court Justice Clark, found that the policy was unconstitutionally vague and an impermissible prior restraint. The Court rejected the *Dunifer* court's argument that First Amendment problems can be solved by creating a First Amendment exception to a regulations: "'It does not at all follow that the phrasing of a constitutional standard by which